No. 404 136

Brief of Cases for Appellants

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 404.

W. H. ANSLEY, M. H. GLEASON, and E. G. EDMONDS, Appellants,

vs.

N. B. AINSWORTH, L. C. BURRIS, G. E. WOODS, JAMES ELLIOTT, and THE OLA COAL AND MINING COMPANY.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

BRIEF OF APPELLANTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 105.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 404.

W. H. ANSLEY, M. H. GLEASON, AND R. O. EDMONDS, APPELLANTS,

VS.

N. B. AINSWORTH, L. C. BURRISS, O. E. WOODS, JAMES ELLIOTT, AND THE OLA COAL AND MINING COMPANY.

APPEAL FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

BRIEF OF APPELLANTS.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

This is a suit in equity, brought in the United States Court for the Central District of the Indian Territory, sitting at South McAlester, by the appellants, plaintiffs below, W. H. Ansley, M. H. Gleason, and R. O. Edmonds, against appellees, defendants below, N. B. Ainsworth, L. C. Burriss, O. E. Woods, James Elliott, and The Ola Coal & Mining Company. The substance of the complaint is as follows:

It alleged that W. H. Ansley is by blood a member and citizen of the Choctaw nation of Indians; that appellants M. H. Gleason and R. O. Edmonds are citizens of the United States by birth, but by virtue of intermarriage with members of the Choctaw nation, solemnized as required by the laws of said nation, became members thereof by adoption and entitled under the treaties and laws of said nation to all the rights, privileges, benefits and immunities of citizens of said nation. That all of said defendants are residents of the Central District of the United States Court in the Indian Territory; that N. B. Ainsworth is a citizen of the Choctaw nation, resident therein, and L. C. Burriss a citizen of the Chickasaw nation, resident in said nation; that O. E. Woods and James Elliott are citizens of the United States, resident in the Choctaw nation. That The Ola Coal & Mining Company is a corporation under the laws of Kansas, engaged in operating a mine in said Choctaw nation, at Wilburton, I. T., and having its offices and agents at said point; the defendant Elliott being president thereof, and the defendant Woods general manager. That the defendants Ainsworth and Elliott reside nearer to the town of South McAlester than they do to any other point at which the United States Court is held in the Central District of the Indian Territory.

1. Plaintiffs specially pleaded article 2 of the treaty executed between the United States and the Choctaw nation on October 18, 1820, whereby the United States ceded to said nation the lands at present held and occupied by it.

Also article 2 of the treaty executed between the United States and the Choctaw nation on September 27, 1830, providing that the United States should convey to the Choctaw nation, under a grant specially to be made by the President of the United States, in fee simple to them and their descendants, to inure to them while they should exist as a nation and live on it, the land theretofore ceded.

Also article 4 of said treaty, whereby the government and people of the United States were obliged to secure to the said Choctaw nation the jurisdiction and government of all persons

and property that might be within their limits west, so that no State or Territory should ever have a right to pass laws for the government of the Choctaw nation and their descendants, and no part of the land granted them should ever be embraced in any Territory or State, but the United States should forever secure said Choctaw nation from and against all laws except such as from time to time might be enacted in their own national council not inconsistent with the Constitution, treaties, and laws of the United States, and except such as might be, and which had been, enacted by Congress to the extent that Congress, under the Constitution, was required to exercise legislation over Indian affairs.

Also article 12 of said treaty, providing, among other things, that all intruders should be removed from the Choctaw nation and kept without it, and that private property should always be respected, and on no occasion taken for public purposes without just compensation being made therefor to the rightful owner.

Also article 1 of the convention and agreement made on January 17, 1837, between the Choctaw and Chickasaw nations of Indians, whereby the Choctaws gave the Chickasaws the privilege of forming a district out of their (the Choctaw) country, to be held on the same terms that the Choctaws held except the right of disposing of it, which was to be held in common between the Choctaws and Chickasaws, and conferring other rights upon the Chickasaws.

Also article 2 of said convention and agreement, which defined the boundaries of the Chickasaw district.

Also the patent executed by the President of the United States on March 23, 1842, conveying to the Choctaw nation the lands described in the second article of the treaty of 1830, granting said lands to the Choctaw nation "In fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States or with their consent."

Also article 2 of the treaty of 1855 between the United States and the Choctaw and Chickasaw tribes of Indians, containing

the stipulation: "And pursuant to the Act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole; provided, however, no part shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

It was alleged that by article 2 of said treaty, a district for the Chickasaws was established and the boundaries thereof fixed and declared. That by article 3 of said treaty it was provided that the remainder of the country held in common by the Choctaws and Chickasaws should constitute the Choctaw district.

Plaintiffs also specially pleaded article 4 of said treaty, providing for the continuance of existing laws until the Chickasaws should adopt a Constitution and enact laws of their own, and providing for the determination of judicial proceedings already instituted according to existing laws.

Also article 5 of said treaty, whereby the right was conferred upon members of either of the tribes to settle freely within the jurisdiction of the other, and be entitled to all the rights, privileges and immunities of citizens thereof, except that no member of either tribe should be entitled to participate in the funds belonging to the other tribe.

Also article 7 of said treaty, providing as follows: "That so far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property in their respective limits, excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise, citizens or members of either the Choctaw or Chickasaw tribe." And fur-

ther providing for the removal of said persons by the United States, with certain exceptions stated.

Also article 21 of said treaty, whereby it was provided that this convention should supersede and take the place of all former treaties between the United States and the Choctaws, and also of all treaty stipulations between the United States and the Chickasaws and between the Choctaws and Chickasaws, inconsistent with the agreement.

It was alleged that in pursuance of the provisions of the treaty of 1820 and of subsequent treaties, the Choctaw people erected a government, distributed its powers among the executive, legislative, and judicial departments, established written constitutions, developed a body of laws,—written and unwritten,—exercised jurisdiction over its citizens and its tribal property, administered justice, founded schools, and in all respects conformed to the laws and usages of civilized states. That in pursuance of an act of the General Council of the Choctaw nation, approved October 24, 1859, representatives of said nation, in convention assembled, ordained and established a Constitution superseding prior Constitutions, which Constitution was in pursuance of said act submitted for ratification or rejection to the qualified voters of the Choctaw nation, at an election held as provided by law, and was at such election adopted by the unanimous vote of all the electors participating in such election, and as thus adopted has continued as the supreme organic law of the Choctaw nation to the present time. Various provisions of the bill of rights contained in this Constitution are specially pleaded, and in particular section 5 of article 1, enacting, "Nor shall any person's property be taken or applied to the public use without the consent of the General Council, and without just compensation being first made therefor."

Also section 11 of said article, providing that no freeman should in any manner be deprived of his life, liberty and property but by the judgment of his peers or the law of the land.

Also section 16 of said article, providing that no power of sus-

pending laws should be exercised except by the General Council or its authority.

Also section 1 of said article, providing that the accused can not be compelled to give evidence against himself, nor be deprived of life, liberty or property but by due course of law.

Also section 21, providing that the General Council should pass no bill of attainder nor retrospective law, nor law impairing the obligation of contracts.

Also section 18 of article 7 of said Constitution, providing, "Any citizen of this nation who shall find any mine, or mines, or mineral waters, shall have exclusive right and privilege to work the same so long as he may choose within one mile in any direction from his works or mines; providing further, he does not interfere with the rights of the former settler."

Plaintiffs also specially pleaded article 7 of the treaty between the United States and the Choctaw and Chickasaw nations, made on the 28th day of April, 1866, whereby the Choctaws and Chickasaws agreed to such legislation as Congress and the President of the United States might deem necessary for the better administration of justice and the protection of rights of person and property within the Indian Territory; providing further, that such legislation should not in anywise interfere with or annul their present tribal organizations or their respective legislatures or judiciaries, or the rules, laws or customs of the Choctaw and Chickasaw nations respectively.

Also article 10 of said treaty, whereby the United States reaffirmed all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations entered into prior to the late rebellion and in force at that time, not inconsistent herewith. It was alleged that said treaty contained provisions looking to the allotment in severalty of the lands held in common with the Choctaw and Chickasaw people.

Article 33 of said treaty was also pleaded, providing that all lands selected as therein provided should thereafter be held in severalty by the respective parties, and all unselected lands should be the property of the Choctaw and Chickasaw nations

in their corporate capacity, subject to the general control of their legislative authorities. It was alleged that an allotment was never made, and that the people of the Choctaw and Chickasaw nations have continued to this date to hold their lands as they held them before the adoption of said treaty.

Article 26 of said treaty was pleaded, whereby it was provided that the right therein given to the Choctaws and Chickasaws respectively should extend to all persons who had become citizens by adoption and inter-marriage of either of said nations, or who might thereafter become such.

Also article 38 of said treaty, enacting that every white person who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw nation or who had been adopted by the legislative authorities, should be deemed a member of said nation and subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he were a native Choctaw or Chickasaw.

Also article 43 of said treaty, whereby the United States promised to exclude white persons, except officers, agents, and employes of the government and of any internal improvement company, or travelers, it being provided that such article should not be construed to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they might deem conducive to the general welfare of the nation, or be taken to interfere with or invalidate any action which theretofore had been had in that connection by either of said nations.

Also article 45 of said treaty, providing that said nations should have all the rights, privileges and immunities theretofore possessed by said nations or individuals thereof or to which they were entitled under the treaties and legislation theretofore made and had in connection with and so far as consistent with the provisions of this treaty.

2. It was alleged that under and by virtue of the provisions

of the Choctaw Constitution, in section 18, article 7, above set out, citizens of the Choctaw nation from the time of its adoption began to prospect for coal, and incurred much expense in making discoveries of coal theretofore unknown; that from said date, without interruption or hindrance, to June 28, 1898, they exercised the right of working by themselves, or licensing or contracting with other persons to work for them, said discoveries and to mine coal thereon for the space of one mile in every direction from the improvements made upon such coal discoveries; that such coal discoveries within such limits were, by uniform custom, usage and construction, from the adoption of the Constitution as aforesaid, held to be the property of the Choctaw citizen discovering the same or of those to whom he devised or assigned the same, provided such devisees or assignees were citizens of the Choctaw nation; that from the adoption of the Constitution, as aforesaid, the custom and usage of leasing said coal claims by the discoverers to persons, or companies, or corporations, for the purpose of mining coal thereupon for a stipulated royalty to be paid to the owner of said coal discovery, had been uniform and long since become thoroughly established and general throughout the Choctaw nation; that said nation recognized the rights of such coal discoverer to lease such coal claims and to receive royalties thereon, under the uniform custom and usage that had grown up under the said constitutional provision as aforesaid. That said nation, by act of its council approved by its governor, enacted laws by which the lessees of said coal claims were permitted to sell the coal mined upon obtaining a contract from the national agent of said Choctaw nation, and upon the payment of a royalty of one-half cent per bushel of coal to said nation. A copy of said act was attached, marked "Exhibit A," and specially pleaded as part of the complaint; that under said law, persons, companies, and corporations mining coal upon the coal discoveries leased from individuals, obtained contracts from the national agent of the Choctaw nation in form and substance the same as that which is attached to the complaint as "Exhibit B" and made a part of it, and which

was obtained by defendant Woods from the national agents of said nations. That the rights of the discoverers of coal claims, their heirs or assigns, to work, lease, or assign said claims were fully recognized in all the Choctaw courts, became the subjects of devise or administration, were sold, transferred and pledged by one member of the nation to another in all the modes incident to absolute ownership of property, and the royalties payable from the lessees of said coal claims became the basis of large advancements for money or supplies by persons within and without the Choctaw nation; that the rights of coal discoverers, their heirs or assigns, to the coal claims within the limits above set out, as established under the uniform custom and usage of the Choctaw nation and the construction of the Choctaw Constitution as aforesaid, were known to and fully recognized by the executive officers of the United States, the Secretary of the Interior, their agents and employes, and that the same were fully recognized by Congress in various acts of legislation. That in the courts of the United States these rights originating under the constitutional provision and under the laws, custom and usage of the Choctaw nation as above set out, and as herein stated and declared, were at all times recognized, vindicated, upheld and enforced; that under the clause of the Constitution aforesaid, and the usage and custom of the Choctaw nation with reference to mines and minerals thereunder, the discovery of coal claims was greatly encouraged; that mines therein were developed by said discoverers or their lessees, and from the working of said mines large royalties accrued to the Choctaw nation, becoming the support of the schools and amounting during the last four or five years to over $100,000 per annum; that it became the settled policy of the Choctaw nation to encourage discoveries by citizens under the constitutional clause and custom above set out, and that in 1889 it passed an act entitled "An act to provide for the further development of the mineral resources of the Choctaw nation; which act is attached to the complaint as "Exhibit C" and specially pleaded. That by its constitutional provision, its laws, usages and customs, its definite

and consistent policy aforesaid, not only were citizens of the Choctaw nation induced to incur expense in making coal discoveries as aforesaid, but great numbers of persons, companies and corporations, not citizens of the Choctaw nation, were allowed to obtain, with full knowledge and approval of the constituted authorities of the Choctaw nation, leases of said coal claims and discoveries from the individual Choctaw citizens discovering and owning them. That for the purpose of mining coal on said leased coal claims, said persons, companies and corporations incurred great expense in preparing the mines to be worked, in purchasing expensive machinery, etc. That the improvements and outlays of said companies and corporations aggregated millions of dollars expended upon the basis of the rights of the individual discoverers and owners of the coal claims as herein above declared. That to give further assurance to coal operators, the council of the Choctaw nation, on September 18, 1896, passed an act to confirm the rights of its citizens by providing that all said claims and discoveries, where the laws of that nation had been observed in making and recording the same, should be the property of the citizen or citizens, who had discovered and recorded said claims, their heirs or assigns, and should be recognized and treated as the property of the citizens holding said claims, and might be by said holders sold, assigned, or devised unto their heirs or assigns, provided the said heirs or assigns should be citizens of the Choctaw nation at the time of making such disposition of said claims. The leases of the owners of coal claims were also confirmed by this act, which is set out at length in the complaint.

3. That under the conventions and agreements between the Choctaw and Chickasaw nations, each nation recognized in the other the right to legislate over persons and property within the limits of their respective districts; that each nation enacted its own legislation for the protection and development of mining rights and interests within their respective limits; that the constitutional provision, custom and usage with reference to mining rights were fully known to the Chickasaw authorities,

became a matter of arrangement between the two nations under the sanction of the Interior Department of the United States soon after the adoption of the constitutional provision aforesaid, and that by and under this arrangement the Chickasaw nation received one-fourth of the royalties paid to the Choctaw nation for the mining of coal within its limits and applied the same to the public uses of the said Chickasaw nation, which with full knowledge and by arrangement had acquiesced in and consented to the laws and customs of the Choctaw nation with reference to mining rights.

4. That on the 7th day of November, 1890, plaintiffs Gleason and Edmonds, and one Lorin A. Riddle, a citizen by blood of the Choctaw nation, discovered coal on the claim described in the complaint. Allegation is made of compliance with all the requirements of the constitutional provision and of the laws and customs of the Choctaw nation by these parties in reference to said coal claim; that by virtue of their discovery and said compliance, the said parties acquired a vested, absolute, and indefeasible right to mine coal within a circle having a radius of one mile, and beginning at the point of excavating coal as aforesaid, and to give, bequeath, sell, transfer, convey, or assign said right to any other Choctaw citizen, and to contract, by lease or otherwise, with any person, company, or corporation to mine coal for a period of years, to the exclusion of any other persons, corporations or companies whatsoever, so long as said persons, corporations or companies complied with the laws of the Choctaw nation to them and their mining operations applicable. That on February 28, 1898, the said Lorin A. Riddle, for a valuable consideration, conveyed his undivided one-third interest in said coal claim to the plaintiff W. H. Ansley. Plaintiffs alleged that they had not been reimbursed for the work and labor done and money expended in making said coal discoveries and for producing coal thereon; that their rights in said discoveries exceed in value the sum of $5000; that by virtue of their discovery and of the purchase by Ansley from Riddle they acquired a vested right in and to said coal claim, indefeasible, and exist-

ing so long as they chose to exercise the same. They alleged that if they were in law mistaken as to the duration of their right in the coal claim above described, then they averred that said right was vested, absolute, and indefeasible so long as the said Choctaw nation should exist as a nation and until the said right should have been divested in the mode provided under the laws of said nation.

5. They alleged a contract by plaintiffs with one O. E. Woods, whereby the said Woods was permitted to mine coal upon said claim for the period of six years upon payment of the customary royalty of one-fourth of one per cent per bushel, and upon compliance with the laws of the Choctaw nation to such mining operations applicable. That the said Woods, by arrangement and agreement with the defendant, The Ola Coal & Mining Company, had authorized said company to mine coal within the limits of the coal claim leased to him; that the terms of said agreement are not particularly known to plaintiffs, but that under said agreement said company became bound to pay plaintiffs royalty on coal mined by it on the coal claim aforesaid, according to the terms of the original agreement. That the said Woods and said company are indebted to plaintiffs in the sum of $1100 as royalties for coal mined on said claim.

6. Plaintiffs set out section 16 of the act of Congress, entitled, "An act for the protection of the people of the Indian Territory, and for other purposes," approved June 28, 1898, making it unlawful for any person, after the passage of said act, to claim, demand, or receive for his own use, or for the use of anyone else, any royalty on oil, coal, asphalt, or mineral, within the limits of the tribes of the Indian Territory, or for anyone to pay any individual any such royalties or rents or any consideration therefor whatsoever.

Also section 18 of said act, providing that any person evading or violating said provision should be punished by fine of not less than $100, and should forfeit possession of any property in question, and that each day in which said offense was committed or continued to exist should be deemed a separate offense.

Also section 29 of said act ratifying the agreement with the Choctaw and Chickasaw tribes of Indians, made by the Commission to the Five Civilized Tribes on the 23d day of April, 1897, as amended, and providing for an election to be held by the qualified voters of said tribes, and enacting that said agreement should have full force and effect if ratified by a majority of the whole number of votes cast. Also the allegation that an election was held as provided, on the 24th day of August, 1898, and it was proclaimed that said agreement had been adopted. The provisions of said agreement as affecting mining rights are set out in full.

Said agreement provided that all coal and asphalt should remain and be the common property of the members of the Choctaw and Chickasaw tribes (freedmen excepted), so that each and every member should have an undivided interest in the whole; that coal and asphalt mines should be under the supervision and control of two trustees appointed by the President of the United States upon the recommendations of the Governors of the Choctaw and Chickasaw nations respectively, acting under such rules as might be prescribed by the Secretary of the Interior. All agreements by any person or corporation with any member or members of the Choctaw or Chickasaw nations, the object of which was to obtain said member or members' permission to operate coal or asphalt mines, were declared void. Said agreement fixed the right of royalty upon coal mines and required payment thereof into the Treasury of the United States.

7. That pursuant to the provisions of said agreement, N. B. Ainsworth and L. C. Burriss were appointed coal trustees for the Choctaw and Chickasaw nations respectively; that the Secretary of the Interior had issued regulations governing mining leases in the Choctaw and Chickasaw nations, section 3 of which regulation was set out in full.

That the defendants Wood and Elliott intended, as officers of The Ola Coal & Mining Company, to make application to said Ainsworth and Burriss, as coal trustees, for a lease to The Ola Coal & Mining Company covering the coal claim or dis-

covery belonging to plaintiffs as described in the complaint. That said trustees intended to receive said application and forward the same to the United States Indian Inspector as in the regulations of the Secretary of the Interior set out, and, if authorized by him, to execute a lease of said premises to The Ola Coal & Mining Company or to defendants Woods and Elliott, or one of them, for its use and benefit; that said defendants Woods and Elliott and The Ola Coal & Mining Company, since the adoption of the act of Congress, approved June 28, 1898, aforesaid, had failed and refused to pay the royalties accruing to plaintiffs under and by virtue of the terms of their obligations to them as aforesaid, as well as the royalties which had accrued and were payable under the terms of said lease prior to said date; that said royalties amounted to the sum of $1100, which was due and payable. That said defendants Woods and Elliott and The Ola Coal & Mining Company intended to pay said royalties into the Treasury of the United States and to wholly and totally disregard the rights of plaintiffs to the same.

8. That by the provisions of said agreement as above set out, and by the acts of the defendants, Woods and Elliott and The Ola Coal & Mining Company, in refusing to pay the royalties due the plaintiffs because of sections 16 and 18 of said act of Congress, and their proposed payment of same into the Treasury of the United States, plaintiffs were deprived of their property without notice, without hearing, and in violation of the fifth amendment to the Constitution of the United States providing that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation, and in violation of section 1 of the fourteenth amendment to the Constitution of the United States, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

That by the action of the defendants Woods and Elliott and

The Ola Coal & Mining Company in applying for and obtaining a lease to the premises included in plaintiffs' lease to them, and by the action of the defendants Ainsworth and Burriss in receiving said application and transmitting the same to the United States Inspector for the Interior Department in the Indian Territory, receiving his approval and executing the said leases and forwarding the same to the Secretary of the Interior, if such acts were permitted, a cloud would be cast upon plaintiffs' rights to said coal claim and upon their right to work the same by themselves or their lessees, and by the operation and enforcement of the provisions of the agreement purporting to be between the United States and the Choctaw nation as above set out, plaintiffs were deprived of property in violation of the provisions of the Constitution of the United States above mentioned.

9. That the provisions of said agreement above set out, so far as they deprive plaintiffs of their right in the coal claim aforesaid and their right to royalties contracted to be paid by the defendants Woods, Elliott, and The Ola Coal & Mining Company for mining coal upon the same, and so far as they conferred authority upon the coal trustees to execute leases of said premises to other persons under the regulations and upon the approval of the Secretary of the Interior, authorized plaintiffs' property to be taken and applied to public use without the consent of the General Council of the Choctaw nation thereunto first had and obtained, and without just compensation being made therefor, in violation of section 5 of article 1 of the Constitution of the Choctaw nation heretofore set out, and authorized plaintiffs to be deprived of their property otherwise than by the judgment of their peers or the law of the land, in violation of section 11 of article 1 of the Constitution of the Choctaw nation heretofore set out, and authorized the taking of plaintiffs' property without due course of law but against said due course of law, in violation of section 17 of article 1 of the Constitution of the Choctaw nation heretofore set out; that such provisions of the agreement impaired the obligation of the contract arising and existing between plaintiffs and the Choctaw

nation under the facts heretofore set out and by virtue of the provision in its Constitution with reference to the rights of coal discoveries heretofore mentioned, in violation of section 27 of article 1 of the Constitution of the Choctaw nation.

That said provisions of the Choctaw Constitution, and the provisions thereof with reference to the rights of discoverers of coal or other minerals, as above set out, were made in pursuance of the treaties of the United States authorizing same and expressly validating said constitutional provisions when enacted, as especially appears from the provisions of article 2 of the treaty of 1820, and article 7 of the treaty of 1855, and article 43 of the treaty of 1866, all of which have heretofore been set out. That the rights of plaintiffs, arising under the laws, customs, usages, and Constitution of the Choctaw nation, authorized to be enacted and adopted by the treaties with the United States and reaffirmed and validated after enactment by said treaties, are rights acquired and vested by virtue of the treaties and laws of the United States, and not defeasible by legislation of the Congress of the United States or of the Choctaw nation, or otherwise than by due process of law after notice and hearing and with full compensation.

10. Plaintiffs averred that the purported agreement between the United States and the Choctaw nation was invalid and inoperative, because not adopted in mode known to the laws, in this: That section 11 of article 7 of the Constitution of the Choctaw nation authorized the General Council of said nation to pass such laws and measures as it should deem expedient for the general good of the Choctaw people, provided no law should be passed or adopted contrary to the provisions of the Constitution; that section 1 of article 9 of said Constitution provided for an amendment of the Constitution to be proposed by a majority of the members of the General Council of the Choctaw nation and voted upon in manner and after proclamation as provided in said article; that the agreement aforesaid was never presented to the General Council of the Choctaw nation nor proposed by a majority of its members as an amendment to the

Constitution, nor was it submitted by the authority and in the manner prescribed for the adoption of amendments to the Constitution, but that the election was held by virtue of a proclamation issued by the Governors of the Choctaw and Chickasaw nations acting without any authority conferred upon them by any law defining their duties as Governors of said nations or pertaining to their respective offices; that at said election members of the Chickasaw nation were permitted to vote at voting places in the Choctaw nation and members of the Choctaw nation to vote at voting places in the Chickasaw nation, whereby the opportunity for fraudulent practices and duplication of votes was furnished and afforded, and by reason whereof it was not possible to know whether said agreement received a majority of the votes cast by the qualified voters of the Choctaw nation; that said agreement affects the title to the land belonging to the Choctaw and Chickasaw people by grant from the United States and patent executed in pursuance thereof, as well as the other property of the Choctaw and Chickasaw people, plaintiffs inclusive; that by virtue of said agreement the property rights of the Choctaw and Chickasaw people in general, and of these plaintiffs in their coal discovery as above set out in particular, were changed, modified, and in the latter case destroyed by an agreement against which nearly one-half of the votes cast were recorded, and which was submitted in accordance with none of the forms of procedure for the Choctaw or Chickasaw nation, as provided by their Constitution and laws made in pursuance of treaties with the United States; that these plaintiffs and the Choctaw people held and acquired their property rights subject to general powers of legislation on the part of the Choctaw nation, as limited and defined by the Constitution and laws thereof, executed consistently with the Constitution and laws of the United States, and that such rights were not subject to be divested, changed, modified or in any way impaired except by due course of legislation enacted consistently with the Constitution and laws of the Choctaw nation aforesaid, adopted in harmony with the Constitution and laws of the United States.

That said agreement, having been adopted in manner and form otherwise than as provided by said Constitution and laws of the Choctaw nation, and divesting, destroying, changing, and impairing many of the rights of the plaintiffs as members of the Choctaw nation, and in particular destroying their rights of property in the coal discovery aforesaid, was because of the mode and form of its promulgation not adopted by due course of law, but against said due course of law and in violation of the fifth and fourteenth amendments to the Constitution of the United States.

11. Plaintiffs further averred that said agreement, so far as it impairs, destroys, modifies, or changes the property rights of the citizens of the Choctaw nation and of plaintiffs, is inoperative and void, because it does not rest upon the free consent of the people of the Choctaw or Chickasaw nations or of a majority of their qualified electors or of any of their citizens. That the appearance of consent to said agreement, existing by reason of the fact that a majority of the votes at the election aforesaid were cast in its favor, is false, specious and unreal, because the voters voting in favor of the same were compelled thereto by coercion and duress exercised by the United States as follows:

By the act of Congress approved June 7, 1897, the jurisdiction of the courts of the Choctaw and Chickasaw nations as theretofore existing was taken away, and after January 1, 1898, conferred upon the United States courts in the Indian Territory, but by said act it was provided that said nations could avoid the effect of this provision by entering into an agreement on or before January 1, 1898, with the Commission to the Five Civilized Tribes theretofore appointed on the part of the United States to treat with said tribes; that commissions on behalf of said Choctaw and Chickasaw nations respectively were appointed by the authorities thereof, who met with said Commission of the United States and framed the agreement aforesaid; that said agreement was submitted to the council of the Chickasaw nation, and by said council rejected; that said agreement

was never submitted to the council of the Choctaw nation; that by the failure to adopt such agreement the jurisdiction of the courts of said nations was taken away by the operation of the act of Congress aforesaid and vested in the United States on and after January 1, 1898.

That the members of said nation were deeply attached to their government with its courts and legislative and executive functions, and were wholly averse to surrendering the same or any part thereof, but preferred to lose the same rather than accept the provisions of said agreement; and that after the jurisdiction of their courts had been taken away by operation of the act of June 7, 1897, said agreement was amended and ratified by the Congress of the United States in the act of June 28, 1898, and directed to be submitted to the qualified electors of the said nations, as hereinbefore set out; that the said act of June 28, 1898, provided in section 26 thereof as follows:

"That on and after the passage of this act, the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

That by the act of June 7, 1897, the jurisdiction to enforce all laws in the Indian Territory had become vested in the United States courts, which thereupon enforced and upheld the laws of said nations whenever they were the basis of property rights, as said courts had done from their organization in the Indian Territory; that by the provisions of section 26 of the act of June 28, 1898, such courts were forbidden to enforce at law or in equity the laws of the Choctaw or Chickasaw nations; that the effect of this provision was that the only courts in which the members of these tribes could assert their rights or seek for redress of injuries were forbidden to recognize any right based upon the laws theretofore controlling the members of said nations and defining their personal and property rights. That by this situation the tenures of all holdings by citizens of the Choctaw and Chickasaw nations, the descent of property,

the devolution of estates, and all the rights of property in whatever form arising or existing, as declared by the only law in which such rights had foundation or origin, were swept away by being rendered unenforcible in the only courts having jurisdiction of the parties.

That by the same act of Congress which inhibited the enforcement at law or in equity of the laws of the Choctaw and Chickasaw nations by the United States courts, the aforesaid agreement was resubmitted, and the citizens of said nations were enabled to secure the continued existence of their governments and their laws and to revest jurisdiction in their courts to enforce said laws by adopting such agreement, and thereby at the same time to avoid the disastrous consequences to personal and property rights, the anarchy with reference to the same necessarily created, if they failed to accept such agreement; that influenced by the desire to continue the government of the nations and the jurisdiction of their courts, and coerced by the suspension of all laws upon which their rights rested, the electors of said nations, against their will and inclination, in the absence of their free consent or desire, voted for said agreement, and by reason of the coercion and duress placed upon them, in manner and form as stated, said agreement, so far as it purports to rest upon the consent of the Choctaw and Chickasaw nations, and to in anywise affect the property rights of the members of said nations and of plaintiffs, and to authorize the acts proposed to be done thereunder by defendants, as before averred, is wholly inoperative, ineffectual, and void, because the adoption of said agreement, secured as aforesaid, was not by due process of law, but against such due process of law, by reason whereof the same is in violation of the fifth and fourteenth amendments to the Constitution of the United States, so far as said agreement is made the basis for divesting property rights of plaintiffs under former laws vested and enjoyed.

12. That from the time the Commission of the United States was created, the members of said tribes were continuously informed by said Commission, by private, public, and published

utterances, that unless said tribes made agreements changing the tenure of their land holdings and the rights of their respective governments the United States would do these things by the exercise of its own plenary powers without regard to the will or inclination of said tribes; that after the adoption of the act of Congress of June 28, 1898, and the ratification by the Congress of the agreement aforesaid, the members of the Choctaw and Chickasaw nations were again told, in the manner aforesaid by the members of said Commission, that unless said agreement were adopted the United States would not only enforce the provisions of the act of June 28th, but would adopt more stringent and radical legislation affecting said tribes and the members thereof; that by these representations and statements the members of said tribes were further coerced and compelled against their will and without their consent or desire into voting for said agreement.

12a. That the agreement aforesaid and all provisions of the act of June 28, 1898, not therein contained, which impaired or affected the property rights of the Choctaw and Chickasaw nations and of the members thereof individually, and so far as they affected or impaired the rights of plaintiffs in their coal claim aforesaid, are inoperative and void, because in said act and in said agreement and by the mode of their enactment and adoption, Congress delegated its powers of legislation to the voters of the Choctaw and Chickasaw nations in violation of sections 1 and 7 of article 1 of the Constitution of the United States.

13. It was averred that if defendants Elliott, Woods, and The Ola Coal & Mining Company were permitted to make application for the lease of the coal claim or discovery as aforesaid and to obtain leases therefor, plaintiffs' right in the premises would be clouded and they exposed to great and irreparable injury. That under article 16 of the act of June 28, 1898, as aforesaid, if plaintiffs claimed or demanded the royalties due from said defendants or which might thereafter become due, they would subject themselves to a fine of $100 for each claim or demand so asserted. That these penalties in the course of a few

years would become great in amount, and expose plaintiffs to the necessity and humiliation of defending charges of crime against the laws, as well as to the loss of their property in making defense. That if the defendants above named paid said royalties into the treasury of the United States as they proposed, plaintiffs would be without remedy, inasmuch as they were unable to sue the United States for the same; that if said defendants paid said royalties to an officer of the United States in pursuance of said agreement, it was doubtful whether plaintiffs could establish liability against them therefor; that in order to establish such liability for each recurring amount of royalty as it fell due, they would be compelled to bring a multiplicity of suits.

14. Plaintiffs alleged that in view of the premises they were remediless at law, and prayed that The Ola Coal & Mining Company, James Elliott, and O. E. Woods, as individuals and as officers of said Ola Coal & Mining Company, their agents, attorneys, employees, and servants, and each and every one of them, be restrained from paying the royalties due plaintiffs or which might become due by virtue of the production of coal on the coal claim or discovery aforesaid into the Treasury of the United States; and that they, and all other persons, companies, and corporations, their agents, servants, and employes, be restrained from making application to the defendants Ainsworth and Burriss, coal trustees as aforesaid, in their individual or official capacity, for the lease of said coal claim or discovery hereinbefore described or any part thereof, and that the defendants Ainsworth and Burriss be restrained from receiving such application to lease said premises, and from forwarding the same to the Inspector of the Interior Department with the statement of facts thereunto pertaining for the purpose of obtaining his authority to execute the same, and from forwarding the same to the Secretary of the Interior at Washington; and that upon final hearing they have judgment against the defendants The Ola Coal & Mining Company, O. E. Woods, and James Elliott for royalties due them by virtue of the production of

coal in said coal claim or discovery as aforesaid, and that they have judgment making perpetual the injunction against all of said defendants as herein provided for, and for costs and for such other and further relief as in equity, under the facts, they might be entitled to. (R., 1-25.)

All the defendants waived summons and entered appearance in the above entitled cause. They demurred to the amended complaint filed by plaintiffs on leave of court, the grounds of said demurrer being:

First, that the complaint does not state facts sufficient to constitute a cause of action.

Second, that the complaint does not state facts sufficient to constitute an equitable cause of action. (R., 32-33.)

The court after argument sustained the demurrer, and upon plaintiffs declining to plead further, dismissed the complaint for want of equity, to which action of the court plaintiffs excepted and prosecute this appeal. (R., 33.)

ASSIGNMENT OF ERRORS.

The plaintiffs in this action in connection with their appeal file the following assignment of errors, which they aver occurred upon the trial of this cause and in the decree rendered therein, to wit:

First. The court erred in holding that the amended complaint in this cause does not state facts sufficient to constitute a cause of action.

Second. The court erred in holding that the amended complaint in this cause does not state facts sufficient to constitute an equitable cause of action, and in holding that the amended complaint in this cause is without equity.

Third. The court erred in sustaining the demurrer of the defendants to plaintiffs' amended complaint.

Fourth. The court erred in rendering judgment in favor of defendants in this cause upon the demurrer filed herein. (R., 34.)

BRIEF AND ARGUMENT.

I.

THE RIGHT OF COAL DISCOVERERS AND THEIR ASSIGNS, UNDER THE PROVISION OF THE CONSTITUTION OF THE CHOCTAW NATION, AS DEFINED BY CONTEMPORANEOUS CUSTOM AND CONSTRUCTION AND THE COURSE OF LEGISLATION OF SAID NATION, TO MINE COAL UPON SAID COAL CLAIMS AND TO PERMIT OTHERS TO MINE COAL THEREON UNDER LEASE, IS A VESTED RIGHT, ARISING UNDER AND BY VIRTUE OF THE CONSTITUTION AND LAWS OF THE UNITED STATES AND PROTECTED BY THEIR SANCTIONS.

The United States, by the treaty made with the Choctaw nation on October 18, 1820, for considerations accruing to the United States that were most ample, ceded the land now occupied by said nation absolutely and without qualification. The grant of this land was complete by the treaty of 1820.

Choctaw Nation v. U. S., 119 U. S.

The limitations upon the title by which it was made a base or qualified fee were imposed in the treaty of 1830 and in the terms of the patent. It is noteworthy, however, that the grant had become complete and operative before these qualifications were annexed to the title. The purpose of the Choctaw nation in surrendering their lands east of the Mississippi River was not only to acquire lands in the west which the nation should own by indefeasible title, but also to establish a government suitable to their people and to preserve their own peculiar laws

and institutions. It was accordingly provided in the treaty of 1830 that the United States should secure to the Choctaw nation the jurisdiction and government of all persons and property that might be within their limits west and secure the nation against all laws except such as might be enacted from time to time in its own national council not inconsistent with the Constitution, treaties and laws of the United States.

7 U. S. Stat. at L., 333.

By the treaty of 1855, article 7, the Choctaws and Chickasaws were secured in the unrestricted right of self-government and given full jurisdiction over persons and property within their respective limits so far as was compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes.

In pursuance of these treaties, the Choctaw nation erected a government modeled after our own State governments, adopted a Constitution, distributed the different powers and developed a body of laws, under which property was accumulated by, and secured to, the citizens of the tribe. The authority under which this government was erected, these laws enacted and such property acquired, was authority emanating directly from the United States. The treaty is analogous to the organic act under which a territorial government may be created. The laws and the course of procedure, legislative and judicial, of the Choctaw nation existed by delegation of power from the government of the United States. The laws and proceedings of the Choctaw nation, in respect of rights and claims arising under them, stood upon the same footing as the laws and proceedings of other territories in the Union. The courts of the country were required to respect their laws concerning property, its descent and the administration of estates and to give effect to them.

Mackey v. Coxe, 18 Howard, 84.

Mehlin v. Ice, 12 U. S. A., 317; 56 Fed. Rep., 12.

The latter case, decided by the United States Circuit Court of Appeals for the Eighth Circuit, is instructive in its considerations of the relations of the Cherokee nation to the United States. Its remarks are as applicable to the Choctaw nation. The Court says:

"The tenure by which the Cherokee nation holds its lands, and its relation to the United States in other respects, are widely different from that of the ordinary Indian tribes. * * * The right of self-government has always been claimed and exercised by the Cherokee nation, and their rights in this regard, so far as relate to their own country and people, have never been questioned by the United States. * * * The social and political condition of the Cherokee nation is imperfectly understood by many. By intermarriage with the whites, they have to a considerable extent come to be of mixed blood. Generations ago they abandoned the chase and the warpath and adopted the pursuits of civilized men. As far back as 1827 they adopted a written Constitution modeled after the Constitutions of the States then surrounding their country. * * * Under their Constitution the government, like that of the States, is divided into three departments, legislative, executive, and judicial, and the functions and jurisdiction of each of these departments is as well defined as it is in the Constitutions of the States. Their judicial system is also modeled after that of the States, and business is conducted in their courts in the same orderly manner."

So complete was the right of self-government conferred upon the Choctaw nation and the other of the Five Civilized Tribes, so capable were these nations of administering their laws, that the United States committed to the exclusive jurisdiction of their courts the trial of citizens of the United States who had become members of the tribe by intermarriage, and permitted the execution of such persons after trial and conviction just as if these powers had been exercised by the States.

Talton v. Mayes, 163 U. S., 197.

The right of the discoverers of coal in the Choctaw nation is a right of property. It is conferred by the Constitution of the Choctaw nation This Constitution was adopted by the unanimous vote of its electors. The right claimed under it

was not called in question for nearly thirty years. Contemporaneous custom and legislative enactment defined and limited the right. The Choctaw nation, by its legislation requiring persons who had mined coal to pay a certain royalty before the same was sold, became a participant in the development of the mining interests and in the profits therefrom. These interests became extensive, and the revenues accruing to the nation therefrom became great in amount. The rights of the owners of coal claims were recognized in the courts of the Choctaw nation; they were upheld and enforced without question in the trial and appellate courts of the United States.

McCurtain v. Grady, 38 S. W., 65.
Atoka C. & M. Co v. Hodges, 19 U. S. A., 407.
Oolagah Coal Co. v. McCaleb, 32 U. S. A., 330.

During more than a quarter of a century Choctaw citizens were allowed to spend money, time and labor in making discoveries of coal and in the development of mining on coal claims. Their rights became the basis of innumerable business transactions, and the division of the public revenue arising therefrom became a matter of convention and agreement between the Choctaw and Chickasaw nations under the sanction of the Interior Department of the United States. These mining rights thus had the sanction of the executive, legislative, and judicial departments of the Choctaw nation, were upheld and vindicated without question in the courts of the United States, and were objects of consideration and sanction by the executive department of the Federal government.

They were also expressly recognized and assented to by the legislation of Congress. Section 6 of the act of March 1, 1889, establishing a court in the Indian Territory, declares the jurisdiction of such court and contains the following provisos:

"Provided, that nothing herein contained shall be so construed as to give the court jurisdiction between persons of Indian blood only.

"And provided further, that all laws having the effect to pre-

vent the Cherokee, Choctaw, Creek, Chickasaw, and Seminole nations, or either of them, from lawfully entering into leases or contracts for mining coal for a period not exceeding ten years, are hereby repealed. Said court shall have jurisdiction over all controversies arising out of said mining leases or contracts and of all questions of mining rights or invasions thereof where the amount involved exceeds the sum of $100."

25 U. S. Stat. at L., 784.

By the act of May 2, 1890, providing a temporary government for the territory of Oklahoma and enlarging the jurisdiction of the United States courts in the Indian Territory, it was enacted: "That the court established by said act (the act of March 1, 1889) shall, in addition to the jurisdiction conferred thereon by said act, have and exercise within the limits of the Indian Territory, jurisdiction in all civil cases in the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction; in all cases on contracts entered into by citizens of any tribe or nation with citizens of the United States in good faith and for valuable consideration, in accordance with the laws of such tribe or nation, and such contracts shall be deemed valid and be enforced by such courts, and in all cases over which jurisdiction is conferred by this act or may hereafter be conferred by act of Congress, and the provisions of this act hereinafter set forth shall apply to said Indian Territory only."

24 U. S. Stat. at L., Sec. 29, p. 93.

In section 31 of the same act it was enacted: "That no attachment shall issue against improvements on real estate while the title to the land is vested in any Indian nation, except where such improvements have been made by persons, companies, or corporations operating coal or other mines, railroads or other industries, under leases or permission of law of an Indian national council or charter or law of the United States."

It will be perceived that by the act of March 1, 1889, all laws preventing the Cherokee, Choctaw, Creek, Chickasaw, and Semi-

nole nations or either of them from entering into leases or contracts for mining coal were repealed. What such laws were or where they existed is not easily answered. But this legislation was doubtless enacted with a view of putting at rest any question of the right of these nations to make such contracts. It would seem to be clear that if the nations could make such contracts they could authorize them to be made by their citizens and ratify the same when made by becoming a party thereto by the issuance of a permit to sell the coal mined upon the payment of the stipulated royalties, which was the actual course of procedure in such cases. But the Congress seemed disposed to avoid the necessity of construction, and to put the question beyond all doubt by the act of 1890. The usage of the Choctaw nation was for the owners of coal claims or discoveries, necessarily Choctaw citizens, to lease the same under contracts for the operation of mines upon such claims; the nations through their national agents also entering into contracts with the lessees or whoever might be the operators of the mines for the payment of stipulated royalties upon the coal sold. These contracts or leases from the individual owners of the coal claims are clearly validated by this legislation, and necessarily if the contract of the owner of the claim under the Indian law was made valid, there must have been the express recognition of his ownership in such claim. The intention of the Congress is further made manifest in section 31 of the act of 1890 with reference to the levy of attachments upon improvements on real estate, such levy being permissible with reference to the improvements made by persons, companies or corporations operating coal mines under a lease, or secondly under permission of law of an Indian national council, or thirdly under charter or law of the United States. There were in this enactment the recognition of three sources of rights as to such improvements: first, the lease of an individual validated by section 29 of the act of 1890; second, the contract of the Indian national council, validated by section 6 of the act of 1889; or third, the charter or law of the United States.

The case of McCurtain v. Grady, supra, is noteworthy not only for its conclusions but for the parties in interest and the counsel representing them and the allegation of right made by them as to coal claims under the Choctaw Constitution, the parties plaintiff including Green McCurtain, subsequently Governor of the Choctaw nation and one of the commissioners negotiating the agreement with the United States in this suit assailed, and N. B. Ainsworth, coal trustee under said agreement, and their counsel including Mr. A. H. Garland, formerly Attorney-General of the United States.

The suit involved the ownership of a coal claim, arising under the constitutional provision, law, usage, and custom set up in this case. The complaint, among other things, alleged that about May 1, 1894, one Krebs, a member of the Choctaw nation, and Philips, one of the plaintiffs, jointly made discoveries of coal, the precise location of the points of discovery being given, and that by reason of such discoveries they became under the Constitution and laws of the Choctaw nation, the absolute owners of all coal being within a radius of one mile in every direction from each one of said points of discovery, and that, through sales and transfers, change of ownership had taken place until the plaintiffs in this action were the owners of the undivided five-eighths of such coal claims and the coal therein, and of all that had been mined upon and taken away therefrom.

The court held that, it being doubtful whether the proper construction of the Choctaw Constitution, article 8, section 18, would allow the discoverer of coal the exclusive right to take all the coal within the prescribed radius, the custom and usage of the nation to allow him the exclusive right to take all such coal was admissible to show that that is the proper construction, citing in support of this position.

Stewart v. Laird, 1 French, 290;

Cohens v. Va., 6 Wheat., 264;

Rogers v. Goodwin, 2 Mass., 475;

Bailey v. Rolfe, 16 N. H., 252;

and the language of Mr. Justice Field in the Eureka case, 4 Sawy., 311, referring to mining laws, with reference to which he said:

"These acts were not drawn by geologists or for geologists; they were not framed in the interest of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such construction as will carry out this purpose."

The court did not have before it the act of the Choctaw council passed in 1896, pleaded in full in the complaint herein, clearing up the confusion in the phraseology of the constitutional provision and expressly validating and confirming the rights of coal discoverers and their lessees.

Neither in this case nor in any of the various proceedings in the courts of the United States wherein these mining rights were adjudicated and upheld was any suggestion made that such rights were in contravention of treaty or law. Finally, however, according to the opinion filed by the trial judge, the United States desired to make changes in the political and property rights of the members of the Choctaw nation. As regards their property rights, this could only be done by their consent. Their consent they refused to give. Thereupon oppressive and onerous legislation was enacted, subverting political rights and utterly destructive of property rights, but by the same legislation it was suggested to the Choctaw people that they might escape from the operation of this law if they should ratify an agreement negotiated with commissioners of the United States, but which agreement was utterly repugnant to them. This agreement, called the Atoka agreement, under these circumstances, was adopted by a majority of the votes cast by the electors of the two nations. This agreement swept away the rights in coal discoveries as they had theretofore existed and been recognized, and then, when such agreement could not otherwise be sustained, for the first time in the whole course of legislation and litigation affecting such rights, it was discovered and announced

by the trial court that they had never had any existence, because in contravention of the terms of treaties and other laws of the United States.

We submit that the unqualified grant of 1820 conferred upon the Choctaw nation, in its political and corporate capacity, the ownership of the land now within the limits of the Choctaw and Chickasaw nations; that when the Chickasaw nation by purchase acquired an interest in such land, it became in its corporate and political capacity a tenant in common with the Choctaw nation, its political and governmental powers being limited to the district by subsequent convention assigned to it; that when the United States conferred upon the Choctaw nation the unrestricted right of self-government and full jurisdiction of person and property, it conferred the power of regulating the enjoyment of the property and lands held by the nation; that when the nation, by its constitutional provision with reference to coal discoveries and the law and usage in connection therewith, permitted its citizens to enjoy rights in such discoveries claimed, it was but exercising the full jurisdiction over property conferred by the terms of the treaty; that its power to enact laws emanated from the United States, and the rights arising under such laws are protected by the sanctions of the Constitution of the United States, and that the mining rights as claimed are not in contravention of any law or treaty of the United States.

A consideration of the various grounds upon which these rights are held to be in such conflict will, we think, conduce to their establishment. These grounds, therefore, will be taken up in order.

II.

IS THE EXISTENCE OF THE RIGHT OF DISCOVERERS OF COAL, AS CLAIMED, IN CONFLICT WITH THE LAWS OR THE PROVISIONS OF TREATIES BETWEEN THE UNITED STATES AND THE CHOCTAW NATION?

This question is answered in the affirmative by the trial judge.

It will be recalled that the land now owned by the Choctaw and Chickasaw nations was conveyed by the treaty of 1820 in fee simple, without qualification. The treaty of 1830 required the United States to make a grant to the Choctaw nation "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it." The patent, which was executed in 1842, conveyed according to the terms of the treaty of 1830, but added the further words, "Liable to no transfer or alienation except to the United States or with their consent." Article 1 of the treaty of 1855 requires the United States to secure and guarantee the lands conveyed to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to hold in common, so that each and every member of either tribe shall have an equal and undivided interest in the whole; provided, further, no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same. It has been held by this court that the treaties, by which qualifications upon the absolute title granted the Choctaw nation were sought to be imposed, were practically without consideration. United States v. Choctaw Nation, 119 U. S., 313. While the question whether a title absolute was qualified or made defeasible by the later treaties is an interesting one, we do not deem it necessary to do more than suggest its existence.

The trial court held, in view of the above provisions, that the

enjoyment of the right in the coal claim as alleged in the complaint was an appropriation and sale of the realty without the consent of the Chickasaws. The court seems to have overlooked the allegation of the pleading that there had been a complete acquiescence and consent on the part of the Chickasaw nation in the grant of this right by the Choctaw nation; that the division of the royalties resulting from the operation of coal mines under the laws and constitutional provision of the Choctaw nation had been a matter of convention and agreement between the two nations under the sanction of the Interior Department, and that as a result of such agreement the Chickasaw nation received one-fourth of these public royalties, and had for a great number of years through its public authorities accepted the same, and by its legislative authority appropriated them to the uses of that nation (R., 11-12); that the contract under which the defendant Woods was operating, made an exhibit to the complaint in this case, was signed not only by the national agent of the Choctaw nation, but by B. F. Byrd, national agent of the Chickasaw nation (R., 28-29), in pursuance of acts of said nation referred to in the contract.

The trial court further concluded that the enjoyment of this right would be in violation of the clause of the treaty of 1855 providing that the lands should be held in common so that each and every member of either tribe should have an equal undivided interest in the whole. To this position it is replied that nothing in the pleading indicates that the plaintiffs, in the holding of this particular coal claim, were holding in excess of what they would be entitled to by an estimate of what each member might have in all the lands of the two nations. Secondly, that it can not be held in the light of all the provisions of the treaties that the intent of this article was to confer upon the members of the tribes simply a communal interest in all the land without the power to acquire the right of use in any particular part of the land. It is a matter of history that it was and has always been the desire of the government to induce the members of the different Indian tribes to take up the ways of civilized life and

to learn the arts of peace, and especially to make advancement in agriculture. These purposes it was utterly impossible to attain if no member of the tribe could acquire any right to cultivate a piece of ground to the exclusion of any of the other members of the tribe.

The objections that defeat the constitutional provision as to individual interests in a coal mine are just as effectual to defeat any right of an individual member of the tribes in a field, or in a farm, or in a house enjoyed to the exclusion of the other members of the tribe.

The construction placed upon the clauses in question would have been an embargo upon any conceivable progress or development on the part of the nations, from the earliest times in our history known as the "Five Civilized Tribes." It would have made impossible the production of a grain of corn, a bale of hay for cattle or stock, the erection of any permanent structure, or the enjoyment of the lands except in their original and natural state. The contemporaneous and uniform construction of the treaties by the parties in interest is wholly against this view. All the Five Civilized Tribes, holding their lands practically by the same title, provided for the acquisition of individual rights in farms and houses, based upon use and occupancy, for the sale of these by one member of the tribe to another and for their transmission by devise or administration from ancestor to heir.

Durant's Laws of the Choctaw Nation, 247.

Under these local laws and this contemporaneous construction of the treaties a development of the country was made possible, and the rights in farms and other holdings became the subjects of legislative enactment by the Congress of the United States and the objects of litigation in the courts not only of the different nations but in the United States courts. In all this volume of litigation, of legislation and development, it was never suggested that the treaties made it impossible for the members of the tribes to acquire by occupancy and possession

the right to segregate portions of the public domain and to apply it to exclusive individual uses, and to convey such rights to other citizens.

Mehlin v. Ice, supra.
Exendine v. Pore, 12 U. S. A., 402; 56 Fed. Rep., 777.
Wilson v. Owens, 38 S. W., 976; 86 Fed. Rep., 571.
White v. Brown, 38 S. W., 335.
Kelly v. Johnson, 39 S. W., 352.
McCauley v. Hazlewood, 19 U. S. A., 343; 59 Fed. Rep., 877; 24 U. S. Stat. at L., p. 95-96.

In the light of the history of the tribes and of the relations of the United States with them, we think that it is correct to say that the limitations upon the alienation of land were limitations upon the tribes acting in their corporate and political capacity, designed to prevent them from disposing of their lands imprudently, or of transferring them to other sovereignties than the United States; that these limitations were never designed to interfere with the unrestricted right of local self-government and the exercise of full control over the enjoyment of the tribal lands in accordance with the laws that might be enacted by such tribes to regulate such enjoyment, or in accordance with the unwritten custom and usages of such tribes, which are as jealously guaranteed by the treaties against encroachment as were their more formally expressed legislative enactments. This view was never questioned until, as the trial judge says, the government of the United States concluded to wrest the consent to a change of tenures from the Five Civilized Tribes by means of compulsive legislation, which swept away the vast body of rights that had developed under the Indian laws and customs, when, to sustain this legislation and to remove these rights from the protection of the Federal Constitution, it became necessary to hold that there never were rights which an individual member of the tribe could acquire in house, or land, or farm, or pasture, or mine.

Thirdly, if the provisions of the treaties mentioned have the

effect contended for, this effect is removed by the acts of 1889 and 1890, the discovery on which the right in this suit is based being made in November, 1890 (R., 12), and subsequent to the passage of those acts heretofore set out.

We agree with the trial judge that it is immaterial to consider the precise technical classification of the mining right conferred by the constitutional provision and the laws and usage thereunder. The members of the Choctaw nation were not schooled in the niceties of expression, as shown by the treaties enacted with them. Their language was not always exact, and frequently it had to be considered in the light of contemporaneous legislation, exposition, and enactment, and of tribal usage and custom. These customs may be the basis of rights in every system of laws.

Strothers v. Lucas, 12 Peters, 410.
U. S. v. Arredondo, 6 Peters, 715.

It was so when our unlettered forefathers, unable to write deeds, conveyed property by physical investiture and customary law. It should be specially the case with an Indian nation, speaking a language different from ours, and basing many of their most sacred rights on custom.

The requirement by the tribe of the payment of a royalty before the coal mined could be disposed of was in effect the reservation of an interest by the nations in the coal claim and in the coal mined instead of an absolute conveyance or alienation thereof, and in some sense grounded the right of the owners of coal claims in contract. Upon this view the trial court urges that the rights of owners of such claims were revocable by the Choctaw nation, and that the effect of the Atoka agreement was the exercise of such right of revocation. Whether the right of the coal discoverer was indeed revocable by the nation is a question that may be pretermitted until it is determined in what way such right could be revoked, and whether in such way it has in fact been revoked by the Choctaw nation. These questions will be considered in their order.

III.

IF REVOCABLE AT ALL, THE RIGHT OF THE OWNERS OF COAL CLAIMS COULD ONLY BE REVOKED IN THE METHOD PROVIDED BY THE CONSTITUTION AND LAWS OF THE CHOCTAW NATION ADOPTED CONSISTENTLY WITH THE AUTHORITY CONFERRED BY THE UNITED STATES IN ITS TREATIES AND LEGISLATION.

Those treaties authorized the Choctaw nation to erect a government. This the nation did It distributed the powers of the government among the legislative, judicial, and executive branches; it devised a method of procedure for the legislative branch and for the amendment of its Constitution. The Constitution of the Choctaw nation confers the right in question. Its legislative grants have confirmed it. Can this right be modified by any other procedure than that framed for the amendment of the Constitution or the expression of the legislative will? Where rights have been acquired under the Constitution and legislation of the Choctaw nation, acting within the limits of power conferred or permitted by the United States, is the divestiture of such rights by legislation or enactment adopted by other procedure than that in existence when such rights accrued a divesture "by due process" or according to law? There can be but one answer to this question.

We do not deem it material to consider how far the Atoka agreement, adopted by methods unknown to the procedure of the Choctaw nation, might be effectual to change political rights or the political status of the members of the Choctaw nation. The question here presented for determination is how far, by mere enactment, property rights, resting upon most solemn assurances and guaranteed in every mode known to law, can have their essential scope, character and enjoyment modified, changed, and, in some particulars, destroyed? Can property rights be thus affected by a mere vote of a majority of the electors inter-

ested? If so, can this result be accomplished by vote of a majority expressed in no mode of procedure known to the law under which the property rights were developed and upheld? These questions are fundamental. They do not suggest the matter of the wardship or the tutelage of the Indian nations; they do not involve the extent of the power of the general government to legislate in the territories of the Union; they do not raise the inquiry how far political structures, rights, or status may be affected by such legislation. The question here presented is whether there exists in this government a power to modify or change property rights wherever existing, by whomsoever enjoyed, whether white man, black man, Indian, Filipino, or Chinaman, by the mere will of a part of the owners expressed in no mode or form of law existent or provided for in the body of laws under which the rights arose and were upheld. This question can not be answered affirmatively, simply because it would, in this particular instance, affect only Indians, for in this case two of the plaintiffs are citizens of the United States, become members of the nation by inter-marriage, but not losing their citizenship of the United States.

Roff v. Burney, 168 U. S., 218.

It can not be answered affirmatively without disregarding fundamental conceptions of government and of property right as they affect men of all colors and races within the power of the United States.

Murphy v. Ramsey, 114 U. S., 15.
First Nat. Bank v. County of Yankton, 101 U. S., 1047.
Scott v. Sanford, 60 U. S., 719.
McCullough v. Maryland, 4 Wheat., 316.

We submit, therefore, that if the right claimed ever had legal existence because of the constitutional provision of the Choctaw nation, the laws and customs pursuant thereto, such right could only be divested by an amendment to the Choctaw Constitution adopted in the method provided for such amendment, and that the provisions of the Atoka agreement, adopted by methods un-

known to the Choctaw Constitution and laws, upon the proclamation of the governors of said nations issued by virtue of authority nowhere conferred upon them by the laws creating their respective offices or defining their duties, was in nowise the divesting of property "by due process of law."

Field, J., in Railroad Tax Case, 13 Fed. Rep., 752.
Davidson v. New Orleans, 96 U. S., 104.
R'y Co. v. State of Minn., 134 U. S., 981.
Sohier v. Mass. Gen. Hosp., 3 Cush., 493.
In re Jacobs, 98 N. Y., 99.
Dartmouth College Case, 4 Wheat., 662-676.
Memphis v. United States, 97 U. S., 921.
Taylor v. Porter, 4 Hill, 140.
Wynehamer v. People, 13 N. Y., 445-446.
People v. Platt, 17 Johns. (N. Y.), 195.
Westervelt v. Gregg, 12 N. Y., 203.

IV.

THE ATOKA AGREEMENT, ADOPTED BY A MAJORITY OF THE VOTES OF THE ELECTORS OF THE CHOCTAW AND CHICKASAW NATIONS, IS INEFFECTUAL AS A REVOCATION OF THE RIGHTS OF THE OWNERS OF COAL CLAIMS IN VIEW OF THE CIRCUMSTANCES OF DURESS AND COERCION ALLEGED AGAINST THE VALIDITY OF THAT AGREEMENT.

In compelling the adoption of the Atoka agreement, the trial court announces that the United States had in view certain general ends: first, to secure a partition of the lands of the two tribes to their individual members; second, to establish and provide municipal government for cities and towns, and to secure title to the inhabitants of the lands on which their homes and business houses should be built; and third, to place the coal and other minerals of the tribes in the hands of an offi-

cer of the Federal government, to be managed and controlled by him. The trial court declares: "Because of the title and tenure by which these Indian land were held, this legislation was impossible without their consent. They held their lands by fee simple title; they held them by a tenancy in common. Congress had no constitutional power to say to them, 'You shall partition your lands and change the tenure of your holdings.' It could not require them to sell to white men the lands embraced within the limits of the contemplated cities and towns; nor could it take from them the custody and control of their mines. Before this could be done, their consent, because of the title to their realty, was an absolute necessity." (R., 42.)

With these propositions of the trial court we are in entire accord. We believe that no one will question their soundness. But the question presented is, must the consent of the Indians be actual or seeming? Must it be a free consent, or is a coerced and compelled consent sufficient? Again we call attention to the fact that the specific question under consideration is not as to the surrender of political rights which is always a political question, but it is one of property right. The complaint alleges and the demurrer admits that the Indians did not give their free consent to the Atoka agreement; that they were wholly opposed to the agreement; that in order to compel their acceptance of it the Congress of the United States enacted certain most onerous and oppressive legislation, the effect of which was not merely to destroy the governments and Constitutions, to which the Indians were fondly attached, but also to deny them the sanction of laws wherein they could enforce or protect their property rights and interests in whatever form these might exist; that the Congress then provided that the Choctaw people might escape the consequences of this legislation of they would adopt the Atoka agreement. The compulsion placed upon every member of the nation by this legislation was this: so far as property rights were concerned he was made practically an outlaw; no court was authorized to adjudicate or protect them. There was no means by which property could be transmitted

from father to son; the law of ownership and the law of inheritance were alike struck down by the denial of a tribunal in which these rights could be enforced. The compulsion is written at large upon the face of the statutes; it was as far-reaching and as terrible as could be brought to bear upon a people. It presented to the members of the Choctaw nation this question: "Shall we ratify the partition agreement and hold property in a modified form, or shall we reject such agreement and cease to have the rights of property at all?" The trial court meets the contention by suggesting that it is not within the power of the courts to inquire into the motives of a co-ordinate branch of the government. We do not seek to inquire into such motives; we do not in anywise question the integrity of those motives; we are dealing with the mental condition of the owners of property, and with the question whether they surrendered certain rights in that property by their free consent or under compulsion. Granting that their free consent is necessary, we think it entirely immaterial how the compulsion may have arisen. The question is not as to whence the compulsion came nor through what motive applied, but whether it was existent and operative upon the minds of those whose consent to the surrender of property rights is claimed. Suppose that the condition, instead of being the loss of a tribunal in which to vindicate property rights, had been penal and punitory; suppose the Congress, instead of providing that if the agreement were not enacted all safeguards of private property should be withdrawn, should have enacted that the question of the ratification of the agreement should be submitted to a vote of the Choctaw people, and that all those who voted against it should be adjudged guilty of a felony and subject to imprisonment for a term of years, would it be pretended that the question whether those who voted for the agreement under this condition gave their consent to the surrender of property rights freely was not open to inquiry? We would freely concede that where the question is as to the surrender of political rights or institutions the question as to how that surrender is obtained can never be inquired

into by the courts. The surrender of such rights is usually the result of the application of force, and the lawfulness or propriety of this application can not be inquired into by a co-ordinate branch of the government. But where the question is whether individuals have given their consent to the surrender of property rights, and such consent is essential to the validity of such surrender, it would seem that the question should always be open whether that consent be a free and actual consent or not, and that the method by which it is compelled, whether by legislation or otherwise, is entirely immaterial.

The principle is thus stated by Justice Field: "Courts can not inquire into the motives of legislators except as they may be disclosed on the face of acts or inferable from their operation considered with reference to the condition of the country and existing legislation."

Soon Hing v. Crowley, 113 U. S., 703.

As we have said, the coercion is written at large upon the face of the statutes. The Choctaw and Chickasaw people were deeply attached to their own laws, courts and institutions. By the act of Congress, approved June 7, 1897, the jurisdiction of the courts of the Choctaw and Chickasaw nations as theretofore existing, was taken away, and was, after January 1, 1898, to be vested in the United States courts in the Indian Territory; but by said act it was provided that said nations could avoid the effect of this provision by entering into an agreement on or before January 1, 1898, with the commission to the Five Civilized Tribes theretofore appointed on the part of the United States to treat with said tribes. Said commissioners were appointed and framed the Atoka agreement, but the people of the two nations preferred to lose their courts rather than adopt such agreement, and the same was rejected by the council of the Chickasaw nation and never submitted to the council of the Choctaw nation. Thereupon the jurisdiction of the courts of said nation became vested in the United States courts on and after January 1, 1898.

The Congress of the United States, in the act of June 28,

1898, adopted the scheme of legislation applicable to the tribes and known as the "Curtis Law," and at the same time took up, amended, and ratified the Atoka agreement and provided for its submission to the qualified electors of said nations. At the same time it enacted, "That on and after the passage of this act (the Curtis law) the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory." The tribes were given until the 1st day of December, 1898, in which to hold an election, as provided, and ratify the Atoka agreement. Thereupon, the provisions of the Curtis law, in conflict with the agreement, were to become inoperative. The agreement provided for the revesting of jurisdiction in the Choctaw courts and thereby furnished tribunals for the enforcement of the Choctaw laws, whose enforcement was inhibited to the United States court, the sole depository of jurisdiction unless the agreement were adopted.

It will be noted that the complaint alleges and the demurrer admits that the commission of the United States, appointed to treat with the Five Civilized Tribes after the adoption of the act of Congress of June 28, 1898, and the ratification by Congress of the Atoka agreement, continuously declared to the members of the tribes by private, public, and published utterances, that unless said agreement were adopted the United States would not only enforce the provisions of the act of June 28, 1898, but would adopt more stringent and radical legislation affecting said tribes and the members thereof, and that these statements coupled with the legislation enacted had the effect of coercing the members of the tribes into voting for the ratification of said agreement. (R.. 23-24.)

V.

THE ACT OF CONGRESS OF JUNE 28, 1898, AND THE ATOKA AGREEMENT ARE BOTH VOID BECAUSE OF THE FACT THAT IN THE ENACTMENT OF THE ONE AND IN THE RATIFICATION OF THE OTHER BY THE CONGRESS AND IN THE PROVISION THAT THE AGREEMENT SHOULD SUPERSEDE THE ACT IF ADOPTED AT AN ELECTION HELD IN THE CHOCTAW AND CHICKASAW NATIONS, THE CONGRESS OF THE UNITED STATES DELEGATED ITS LEGISLATIVE POWER, IN VIOLATION OF SECTIONS 1 AND 7 OF ARTICLE 1 OF THE CONSTITUTION OF THE UNITED STATES.

The act of June 8, 1898, was formally adopted as law by the Congress of the United States. It contained a comprehensive scheme of legislation affecting property rights, political rights, the existence and duration of the Choctaw governments, the jurisdiction of courts. Nearly everything that could be the subject of legislation was affected by this act. The Atoka agreement, negotiated between the commissioners of the United States and the commissioners of the Choctaw and Chickasaw nations, likewise embodied a comprehensive scheme of legislation as general and far-reaching in its character as the Curtis law, but essentially and radically different from that act in many vital particulars. It would be difficult to conceive of an act of legislation touching in a greater variety of ways a greater volume of rights, powers and privileges than the act of Congress on the one hand and the Atoka agreement on the other. At the same time that the Congress passed its act it provided for an election, at which the qualified electors of the Choctaw and Chickasaw tribes of Indians were to vote, and enacted that if the majority of the whole of such votes should be in favor of the agreement the same should be held to be adopted, and that the provisions of the Curtis act should only apply to said tribes

where the same did not conflict with the provisions of said agreement. Let us note a few things wherein the act of Congress and the agreement differ.

Under the act of Congress the tribal courts were still divested of the jurisdiction which had been taken from them by the act of June 7, 1897. This jurisdiction affected the entire enforcement of the criminal law against members of the tribes, the protection of personal property, the administration of estates, the determination of civil controversies. By its act Congress evinced its judgment that the Indian courts should no longer have this jurisdiction. By the Atoka agreement the great mass of this jurisdiction was restored to the tribal courts. By the act of Congress the enforcement of the tribal laws was inhibited to the United States courts, and such laws could not be enforced anywhere else because there were no courts having jurisdiction. The agreement, by restoring the tribunals, restored this mass of law applicable to all the variety of rights and relations. The act of Congress provided for the allotment of the surface of the land; the agreement provided for the allotment of the land in fee. In many other respects did the two acts conflict. What did the Congress in effect say by its adoption of the one act and its contingent adoption of the other? It said to the members of the Choctaw and Chickasaw nations: "We have exercised our legislative judgment and discretion and embodied it in our act. Your discretion and your judgment may be different from ours. If a majority of your people entertain different views of policy and so express yourselves in the election to be held, then our legislative judgment shall yield to yours; our act shall be inoperative in whatever particular it conflicts with the act ratified by you. We will adopt two schemes of legislation in essential and open conflict, repugnant in vital matters, affecting property rights, the jurisdiction of courts, the body of laws that shall be operative. You may make choice of which you prefer. We delegate to you to say whether you like one system or the other, and according to your choice and judgment, the one system or the other shall be operative. We leave to you to say whether the jurisdiction to enforce the criminal law for your

people shall remain where it now is, in the courts of the United States, or shall be transferred to your courts. We leave to you to say whether the laws defining crime among your people shall be the laws of the United States as now, or shall be the laws of the Choctaw nation. We leave to you to say whether your laws establishing and upholding property rights shall be operative or whether there shall be no laws touching these rights." It seems to be beyond the power of controversy that here is a delegation of authority. If the Congress had only ratified the Atoka agreement, and then made its operation contingent upon its ratification at an election to be held in the Choctaw and Chickasaw nations, the question would have been raised whether the submission of the law to a popular vote is simply making the operation of such law contingent upon a future event and not a delegation of legislative authority. The whole weight of reason and the preponderance of authority is against such method of enacting law.

Field v. Clark, 143 U. S., 442.
Parker v. Conn (Penn.), 47 Am. Dec., 480.
State v. Swisher, 17 Texas, 441.
Bartow v. Imrod, 59 Am. Dec., 50.
Cooley's Const. Lim., 139-142, et seq.

This question, however, is not the question presented by the facts. The Congress exercised its judgment in the act adopted by it. It then delegated to the Choctaw and Chickasaw nations to modify, to change, and, in important and vital particulars, to annul its act by the adoption of the agreement. Suppose the Congress of the United States had directed that its own act and the Atoka agreement be voted upon by the electors of the Choctaw and Chickasaw nations, and that that one should be the law which received a majority of the votes, would anyone question whether this was a delegation of legislative authority? Did it not just as directly delegate its authority in the actual case by submitting the agreement to the vote of the Choctaw and Chickasaw electors, and providing that its own act should be annulled if such agreement were adopted? Because it is im-

possible to say which of these two acts represents the judgment of the Congress, as the enactment of the one and the ratification of the other were contemporaneous, it seems to us that both should be declared ineffectual and void, because of the impossibility of knowing which scheme of legislation received the legislative sanction.

The trial court considered that in submitting the agreement to the ratification of the tribal electors the Congress simply made the operation of law dependent upon a future contingency. The doctrine is entirely specious and unsound which holds that the result of a popular vote is a contingency. Such doctrine leads to palpable evasions of the duty devolved upon representatives in a representative government. But it is not deemed necessary to consider this question at any length, because the case does not raise the question of this method of adopting legislation. The case here presented is that of the adoption of a comprehensive scheme of legislation by the Congress and the delegation of power to an entirely different agency and judgment to modify, change, and annul the congressional legislation.

Neither is the trial court correct in invoking the doctrine of local option laws or the power of particular communities to determine local questions of taxation or improvement affecting such community alone. The exercise of these powers the States can properly delegate to municipal corporations or to the communities. But the determination of these local questions will not be confounded with the delegation of power to adopt comprehensive schemes of legislation affecting the jurisdiction of courts, the enforcement of civil and criminal laws, and all the rights of property and all the public and private relations.

It is hardly necessary to state that the appellate jurisdiction of this court is invoked in the first instance because the cause presents a constitutional question.

All of which is respectfully submitted.

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